Supreme Court, U. S.
FILED
SEP 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-496

WILLIAM L. CARGILE and THOMAS F. MORGAN,
Petitioners,

v.

STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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962-8745

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CITATIONS

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The Petitioners, WILLIAM L. CARGILE and THOMAS F. MORGAN, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the Supreme Court of the State of Michigan rendered in these proceedings on July 18, 1977.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals, reported at 50 Mich. App. 288 (1973), appears at Appendix A, infra pp. 14-19. The Opinion of the Michigan Supreme Court, as yet unreported, appears at Appendix B, infra, pp. 19-29.

JURISDICTION

The Order or Judgment of the Michigan Supreme Court, reversing the Michigan Court of Appeals and affirming Petitioners' convictions, was entered on July 18, 1977. This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

1. **WHETHER THE DECISION OF THE MICHIGAN SUPREME COURT HOLDING THAT THE DEFENDANTS WERE NOT PREJUDICED BY THEIR UNWILLING ABSENCE FROM AN IN-CHAMBER VOIR DIRE ON THE QUESTION OF JURY PREJUDICE IS CONSISTENT WITH THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .; to be confronted with the witnesses against him . . . .

Constitution of the United States, Amendment XIV, Section 1.

. . . Nor shall any state deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

On or about November 2, 1971, WILLIAM L. CARGILE, THOMAS F. MORGAN and two (2) others were tried in the Recorder's Court for the City of Detroit on one (1) Count of First Degree Murder, two (2) Counts of Kidnapping and two (2) Counts of Felonious Assault.

On the fourth (4th) day of trial, November 5, 1971, the Jury was excused and counsel for MORGAN moved for a mistrial on the grounds of prejudicial publicity in that a local newspaper printed information prejudicial to the Defendants. The defense was also concerned that local television reports about witness intimidation in another case might have prejudiced the Jury in that a witness against the Defendants had changed her testimony at trial (IV, 378-380). (All such references are to the Trial Transcript.) After hearing argument, the Trial Court decided to hold an in-chambers voir dire of each juror to determine whether or not they had been affected by the newspaper and television reports (IV, 385). The Court asked all attorneys to participate. It appears from the record that the Defendants were not present in Court to hear this ruling but had been removed when the Jury was excused (November 4, 1974 and November 7, 1974 Evidentiary Hearing Transcript at 110, 114-116, 119, 120-121). In any event, the Defendants were not asked to participate in the voir dire, were not advised that they had a right to be present at the voir dire (Evidentiary Hearing Transcript at 118) and, in fact, were not personally present during the voir dire.

At the in-chambers voir dire it was discovered that none of the fourteen (14) jurors were familiar with the newspaper articles. However, two (2) jurors had heard or seen part of the television report. They were both able to relate that the report dealt with the burning of the house of a witness in another case but the jurors apparently were of the opinion that this would not influence their impartiality (IV, 386-425).

The Prosecutor requested the Court to excuse the two (2) jurors to cure any possible prejudice (IV, 428) but defense counsel objected (IV, 428-432). There is no evidence that defense counsel either advised the Defendants of the above developments or consulted with them on the question of whether they should seek to excuse or retain the two jurors in question. After the hearing, the Motion for Mistrial was denied and no jurors were excused.

On or about November 17, 1971, CARGILE and MORGAN were each convicted of two (2) Counts of Kidnapping and two (2) Counts of Felonious Assault. The two jurors who were familiar with the television film participated in the verdict (Appendix B at 23).

On December 17, 1971 CARGILE and MORGAN were each sentenced to forty (40) to ninety-nine (99) years on each Kidnapping conviction and three (3) to four (4) years on each Felonious Assault conviction, sentences to run concurrently.

The Defendants appealed to the Michigan Court of Appeals which rejected all but one of the issues raised. The Defendants objected to their absence during the in-chamber questioning of jurors and the Court of Appeals relied on *People* v. *Medcoff*, 344 Mich 108 (1955), to remand the case to the Trial Court for an Evidentiary Hearing on the issue of whether the Defendants had been advised of their right to be present and whether they had waived that right. The Court of Appeals instructed the Trial Court to grant a new Trial if the Defendants had not been advised of their right to be present and if they had not waived it (Appendix A).

At the Evidentiary Hearing, the Trial Court found that the Defendants had not been advised of their right to be present during the in-chambers voir dire and ordered a new Trial (November 4, 1974 and November 7, 1974 Evidentiary Hearing Transcript at 148).

The People appealed to the Michigan Supreme Court on this issue alone and on July 18, 1977, that Court reversed the Court of Appeals and reinstated the convictions on the grounds that the Defendants had no constitutional right to be present at the proceeding and because the Defendants had not asked to be present and had not objected to their absence. The Michigan Supreme Court found there was no reasonable possibility that the Defendants were prejudiced by their absence from the said hearing (Appendix B).

REASONS FOR GRANTING THE WRIT

1. BY THEIR ABSENCE FROM THE IN-CHAMBERS VOIR DIRE THE PETITIONERS WERE DEPRIVED OF THE OPPORTUNITY TO ADVISE THEIR ATTORNEYS ON THE RETENTION OR EXCLUSION OF JURORS AND WERE PREJUDICED BY THE DENIAL OF THEIR RIGHT TO BE PERSONALLY PRESENT AT A CRITICAL STAGE OF THE PROSECUTION IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, IN THAT A FAIR AND JUST TRIAL WAS NOT ENSURED BY THE PRESENCE OF COUNSEL ALONE.

In reaching its decision in the case at bar, the Michigan Supreme Court reversed an earlier state case, *People* v. *Medcoff, supra*, holding that "Injury is conclusively presumed" once the absence of a Defendant during trial is established, and replaced it with the standard that reversal is required only where there is a "reasonable possibility of prejudice" arising from the absence (Appendix B at 25). The Court then found no reasonable possibility that CARGILE and MORGAN were prejudiced by their absence during the questioning of the Jury because: the Defendants had not been affirmatively excluded from the questioning and did not object to their absence; the voir dire was handled properly; there was no question of Jury misconduct and the jurors were not prejudiced by the publicity; and, defense counsel objected to the discharge of any of the jurors (Appendix B at 25-27).

Fed. R. Crim. P. 43 guarantees a defendant's presence at every stage of a Federal Prosecution and perhaps for this reason the Federal Courts have not had to determine the precise constitutional dimensions of this right. M.C.L.A. 768.3 also provides a similar right under State law. Although the right to be present at trial has not been strictly defined as a matter of Federal Constitutional Law, there is little dispute that it is grounded on either the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment and that it is applicable to the states.

According to *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970), one of the most basic of the rights guaranteed by the Confrontation Clause of the Sixth Amendment is the accused's right to be present at every stage of his trial. The Due Process Clause of the Fourteenth Amendment has likewise been held to protect the right to be present, particularly during Jury Voir Dire. *Hopt* v. *Utah*, 110 U.S. 574 (1883); *Lewis* v. *United States*, 146 U.S. 370 (1892); *United States* v. *McCoy*, 429 F2d 739 (D.C. Cir. 1970).

In the instant case, it appears that the Defendants were removed from the courtroom before the Court announced its decision to hold the in-chambers voir dire (November 4, 1974 and November 7, 1974 Evidentiary Hearing Transcript at 110, 114-116, 119, 120-121). Thus, the Defendants were not informed of what was about to take place and had no opportunity to insist upon their presence or object to their absence. It is uncontroverted that the Defendants were not informed of their right to be present and their presence was not requested. Under these circumstances, the Defendants cannot be said to

have knowingly waived any such right (November 4, 1974 and November 7, 1974 Evidentiary Hearing Transcript at 148). While the right of a criminal Defendant to be personally present at all stages of the proceedings may be waived or forfeited, *Illinois* v. *Allen, supra*, it would be error to conclude, as the State Supreme Court apparently did, that this right is somehow of less consequence because the Defendants here did not demand their presence or object to their absence. A valid waiver requires "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 469 (1938). The waiver of a constitutional right will not be presumed from a silent record. *Carnley* v. *Cochran*, 369 U.S. 506 (1962).

Hopt v. *Utah, supra*, held that it was reversible error to challenge and question jurors out of the presence of the Defendant. See also, *Lewis* v. *United States, supra*. In *Snyder* v. *Massachusetts*, 291 U.S. 97 (1933), the Supreme Court declined to find every absence of a Defendant to be prejudicial. The Defendant in *Snyder* contended that it was a violation of due process of law for a State Court to refuse to allow him to be present when the Jury viewed the scene of the crime. A majority of the Supreme Court disagreed.

> So far as the Fourteenth Amendment is concerned, the presence of the Defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence . . . *Snyder, supra*, at 107-108.

The Court concluded that the Defendant's absence from the Jury view was not prejudicial since the only possible advantage to be gained from his presence was to make certain that the Jury examined the right scene, and this was admitted at trial.

Under the above test, the Michigan Supreme Court certainly erred in its conclusion that there was no reasonable possibility that CARGILE and MORGAN were prejudiced by their absence from the Jury voir dire. The presence of counsel alone did not provide a fair and just hearing within the meaning of either the Sixth Amendment or the Fourteenth Amendment.

Defense counsel at trial initially challenged all fourteen (14) jurors. At the hearing, it was discovered that none of the jurors knew anything about the newspaper articles in question, but that two (2) jurors were familiar with the prejudicial television reports. Although the Prosecutor requested that these two (2) jurors be excused (IV 428) defense counsel insisted that the jurors be allowed to remain (IV 428-432). At no point did defense counsel advise the Defendants about the developments at this hearing nor were the Defendants ever consulted by their attorneys about the decision to allow the two (2) jurors to remain. Because of their absence from the hearing the Defendants had no opportunity to examine the jurors themselves or to observe the jurors' responses to the questions put to them, and as a result they were unable to intelligently participate in the decision to retain or excuse the two (2) jurors. The Defendants were deprived of the right to assist, or even to overrule, their attorneys in the decision to retain or eliminate those jurors.

In *Hopt* v. *Utah, supra*, the Defendant objected to his absence at a proceeding where the jurors were challenged and questioned. The Supreme Court reversed the conviction, holding at 578:

> The prisoner is entitled to an impartial Jury . . . and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel . . . in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only.

While the instant case may not deal with the absence of a Defendant during the initial voir dire of jurors, it is concerned with an examination of jurors' qualifications in the absence of the Defendants. One of the primary advantages of being present at trial is the Defendant's ability to communicate with counsel, *Illinois* v. *Allen*, *supra*, at 344, and that ability is greatly reduced if not totally eliminated when a Defendant is not personally present during a stage of the trial. In *Near* v. *Cunningham*, 313 F2d 929 (4th Cir. 1962), the Fourth Circuit held that a habeas corpus hearing was required where the Petitioner claimed that he was denied due process by his absence from an in-chambers conference where it was agreed that the Jury would not be sequestered. The prejudice alleged was that the Jury later mingled with spectators and heard prejudicial remarks. In *United States* v. *Clark*, 475 F2d 240 (2d Cir. 1973), the exclusion of the Defendant from a hearing on a Motion to Suppress Evidence was found to be plain error. The Second Circuit held that the Defendant was entitled to be present to assist counsel by providing factual information for use in cross-examination and by pointing out inconsistencies in testimony.

If the Defendants here had been present during the Jury voir dire, they would have been able to personally participate in and observe the questioning of the jurors as well as the substance and tone of their responses. In that the Prosecutor was of the opinion that the release of the two (2) jurors was called for, by their personal participation in or presence at the hearing, the Defendants would have been able to use their own knowledge and experience to decide for themselves whether it was in their best interests to join in this request, and had they convinced their attorneys to do so,

or had they overruled the decision of their attorneys to the contrary, the jurors in question may well have been excused and would not have participated in the verdict.

> . . . The Confrontation Clause of the Sixth Amendment gives the accused a right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence. This right to "presence" was based upon the premise that the defense may be made easier if the accused is permitted to be present at the examination of jurors . . . for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether . . . *Snyder* v. *Massachusetts*, *supra*, at 106.

This right to be present during the impanelling of a Jury has been widely recognized and strongly upheld. The significance of this right would appear to be equally as strong where the elimination or retention of jurors rather than their selection is at issue. As the Second Circuit recognized in *United States* v. *Crutcher*, 405 F2d 239, 244 (2d Cir. 1968), a major reason for granting Defendants an ample opportunity to confer with counsel during all phases of the Jury selection process is that:

> . . . There is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impaneling of the jury. * * * (W)e can only speculate as to what suggestions (the defendant) might or might not have made, since it would be his prerogative to challenge a juror simply on the basis of the " 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.' "

The prejudice in the instant case evolves around similar considerations and resulted in an even more prejudicial outcome. CARGILE and MORGAN had no opportunity to exercise their right to advise their attorneys on the course of action to take with respect to any of the jurors, and especially in regard to the two (2) jurors exposed to the objected-to television reports.

A criminal Defendant is constitutionally entitled to be present at all phases of his trial, including Jury selection, *Phillips* v. *United States*, 533 F2d 369, 370 (8th Cir. 1976). The purpose of this presence requirement is so the Defendant will be able to assist, advise or even supersede his attorneys in the course of his defense. *Snyder* v. *Massachusetts*, *supra*. This presence requirement and its importance to the role each Defendant is entitled to play in his own defense would seem to have been elevated to an even higher level by *Faretta* v. *California*, 422 U.S. 806 (1975), which relied on *Snyder* v. *Massachusetts*, *supra*, to recognize the constitutional right to self-representation.

While the absence of a Defendant at a critical stage of a criminal prosecution may in some circumstances be harmless error, it cannot be said beyond a reasonable doubt that the Defendants here were not prejudiced by the violation of their constitutional right to be present during the questioning and challenging of the jurors. See, *Rogers* v. *United States*, 422 U.S. 35 (1975). This is not a situation such as that in *Snyder* v. *Massachusetts*, *supra*, where the presence of the Defendant at a Jury view would have accomplished nothing to the Defendant's advantage. The Defendants here were charged with capital crimes, would have been able to understand what

took place at the conference, and their presence and participation could have affected the outcome. By their absence, the Defendants were barred from participating in the decision of whether to retain or excuse the jurors, and when two (2) of the jurors participating in the verdict had been exposed to prejudicial information and may have been excused had the Defendants been present and insisted on their release, it cannot be said that this violation of the constitutional right to be present was harmless beyond a reasonable doubt. The presence of counsel alone at the in-chambers conference did not provide a fair and just hearing so far as either the Sixth Amendment or the Fourteenth Amendment are concerned.

CONCLUSION

For the foregoing reasons Petitioners WILLIAM L. CARGILE and THOMAS F. MORGAN respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Michigan in this case.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS

(People v Morgan; People v Cargile; People v Monroe)

Thomas F. Morgan, William L. Cargile and Edmond B. Monroe were convicted of kidnapping and felonious assault. Defendants appeal. Remanded for further evidentiary proceedings consistent with the opinion.

Frank J. Kelley, Attorney General, Robert A. Derengoski, Solicitor General, William L. Cahalan, Prosecuting Attorney, Dominick R. Carnovale, Chief, Appellate Department, and Michael R. Mueller, Assistant Prosecuting Attorney, for the people.

Charles Campbell, for defendants.

Before: R.B. Burns, P.J., and V.J. Brennan and Van Valkenburg,* JJ.

R.B. Burns, P.J. The defendants were each convicted of two counts of kidnapping,[1] two counts of felonious assault,[2] and were acquitted for felony-murder.[3]

On the Court's own motion we consolidated appellants' separate appeals.

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* Former circuit judge sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, §23 as amended in 1968.

[1] MCLA 750.349; MSA 28.581.

[2] MCLA 750.82; MSA 28.277.

[3] Murder in the perpetration or attempted perpetration of a kidnapping. MCLA 750.316; MSA 28.548.

Oddie Morgan was robbed and held for $5,000 ransom by Tom Todd. Curtis Atkinson and Donny Young were present at the time. Later in the day defendant Monroe and other men took Edward Love and Atkinson from a poolroom, placed a blindfold over their eyes, and took them to an apartment on the third or fourth floor. When the blindfolds were removed Monroe, William Cargile, and Thomas Morgan were present. The defendants asked Love and Atkinson where Oddie Morgan was, and when they replied that they didn't know, they were beaten. Love and Atkinson were undressed and placed in a closet. When they were let out of the closet Curtis Young was present, his head bruised and bleeding. The three, Young, Love, and Atkinson, were piled on top of each other, and lighter fluid was poured over them and ignited. The three were then placed back in the closet.

The next morning Love and Atkinson were removed from the closet, dressed, blindfolded, taken from the apartment, and released near their homes. Young was still at the apartment when Love and Atkinson left.

After Love and Atkinson were released, Curtis Young jumped out of one of the windows in the apartment. Some of the men in the apartment left, and gunshots were heard later. Curtis Young was found dead.

Monroe has raised one issue not raised by the other defendants. Morgan and Cargile were arrested and had a preliminary examination prior to Monroe's arrest. At the time of the trial Atkinson could not be found and his testimony, taken at the preliminary examination, was read in evidence. As Monroe was not present at the preliminary examination, he was denied the right of confrontation and the testimony was not admissible

against him. *Pointer* v *Texas*, 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965). The admission of this testimony was error and in our opinion could not be cured by the trial judge's instructions.

However, before the case was submitted to the jury the prosecution realized the possible prejudice and informed the court that he would agree to a severance and a retrial for Monroe. Monroe's attorney, after a conference with the defendant, rejected the offer. As stated in *People* v *Brocato*, 17 Mich App 277, 305; 169 NW2d 483, 497 (1969):

> "Counsel cannot sit back and harbor error to be used as an appellate parachute in the event of a jury failure.'

The prosecutor introduced into evidence photographs of the body of the victim of the alleged felony-murder and photographs of the burned back of one of the complainants. Defendants claimed it was error to show those photographs to the jury because they did not contest the manner of Curtis Young's death, nor did they dispute the occurrence of a felonious assault on the complainants or the manner of that assault.

In *People* v *Eddington*, 387 Mich 551, 562; 198 NW2d 297, 301 (1972), the Court stated:

> "In a criminal case, the burden is upon the people to prove every element of the crime charged. These are not nice pictures but they are not anymore gruesome than some of the testimony by witnesses. The pictures showed the victims as they were found. The pictures depict the corpus delicti."

Defendants were charged with assault by means of a dangerous weapon, to wit: lighter fluid. In order to prove the charges of assault the prosecution had to prove that the instrumentality used to accomplish the assaults was a "dangerous weapon." Some instrumentalities are obviously dangerous weapons, *e.g.*, guns and brass knuckles. Other instrumentalities are not dangerous weapons unless used in furtherance of an assault and in a manner capable of inflicting serious injury. Proof of any injury actually inflicted is itself proof of the dangerous character of the instrumentality as used. *People* v *Goolsby*, 284 Mich 375, 378; 279 NW 867, 868-869 (1938); *People* v *Vaines*, 310 Mich 500; 17 NW2d 729 (1945).

Since lighter fluid is not an obviously dangerous weapon, evidence of the wounds inflicted by its use is highly probative of its character as a dangerous weapon. Therefore, the photographs of the burned back of one of the complainants were properly admitted by the trial judge.

Photographs of the body of a murder victim are proof of the corpus delicti. *People* v *Eddington*, *supra*, at 562; 198 NW2d at 301. Therefore, the photographs of the body of Curtis Young were properly admitted.

Defendants assert the trial court erred by not instructing the jury that the prosecutor must prove venue; that the alleged offenses were committed in the City of Detroit.

Failure to so charge was error. Venue is a necessary element of alleged crime and must be proved by the prosecution beyond a reasonable doubt. However, in this case we consider this oversight "harmless error". The

record is replete with uncontradicted testimony that these crimes were committed in the City of Detroit. Venue was established. The error was harmless. *People* v *Boyles*, 11 Mich App 417; 161 NW2d 448 (1968).

Defendants also complain that the trial judge misstated the law of kidnapping in his instructions. When read as a whole the trial judge adequately instructed the jury as to the charge of kidnapping. Instructions must be read as a whole. *People* v *Dye*, 356 Mich 271; 96 NW2d 788 (1959).

Defendants claim they were denied a fair trial, when during the course of the trial two articles appeared in a local newspaper; both articles contained information about the case which had not been presented to the jury.

The trial judge interviewed each of the jurors and each denied having seen the newspaper articles. The trial judge did not err in denying defendants' motions for a mistrial.

When the judge interviewed the jurors concerning the first newspaper article, counsel was present for all defendants, but the defendants themselves were not present. *People* v *Medcoff*, 344 Mich 108; 73 NW2d 537 (1955) requires that the defendants, as well as counsel, be present when a judge questions jurors as to possible prejudice concerning newspaper articles.

The record is silent concerning any waiver on the part of the defendants. In an affidavit submitted to the court the prosecutor states that he personally informed all three defense attorneys of the trial judge's plan to question each juror in chambers, that he urged each to consult with his respective client, and that each defense attorney, after speaking with his client, advised the prosecutor that the defendant did not wish to be present. In reply affidavits two attorneys state they do not remember such a conversation and one attorney denies any conversation.

If the prosecutor's allegations are accurate, defendants waived their right to be present. However, we cannot resolve the factual dispute between the prosecutor and defense counsel. Accordingly, we remand for an evidentiary hearing. If it is determined that defendants were advised by their attorneys of their right to be present when the trial judge questioned the jurors, defendants' convictions are affirmed. On the other hand, if the defendants were not so advised by their attorneys, new trials must be ordered.

The cause is remanded to the trial court for proceedings consistent with this opinion.

All concurred.

APPENDIX B

OPINION OF THE MICHIGAN SUPREME COURT

(People v Morgan; People v Cargile; People v Monroe)

BEFORE THE ENTIRE BENCH

M.S. COLEMAN, J.

The defendants had a jury trial and were convicted of two kidnappings and two felonious assaults. During the trial, the judge and the attorneys questioned the jurors in the judge's chambers to determine whether the jurors had seen certain media publicity and, if so, whether it would affect their judgment. The defendants remained in the courtroom while the jurors were questioned in chambers. The Court of Appeals said this entitled the defendants to a new trial.[1]

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[1] *People* v *Morgan*, 50 Mich App 288; 213 NW2d 276 (1973).

We disagree. The record in this case demonstrates there is no reasonable possibility that these defendants were prejudiced by their absence during the questioning of the jurors. The Court of Appeals is reversed and the defendants' convictions are reinstated.

I

The evidence at trial established that Edward Love and Curtis Atkinson were blindfolded and kidnapped by Edmond Monroe, a former codefendant in this case.[2] Monroe took Love and Atkinson to an apartment where defendants Morgan and Cargile were waiting. Love and Atkinson were beaten, forced to undress and locked in a small closet. When they were let out of the closet, Curtis Young was present in the apartment. His head was bruised and bleeding. The defendants forced Love, Atkinson and Young to lie on the floor in a pile, naked. Then the defendants doused the victims with lighter fluid and set them on fire. When the fire died out, all three victims were locked in the closet. The next morning when they were let out of the closet, Curtis Young jumped out a second story window trying to escape. Gunshots were fired. Later, he was found dead. Love and Atkinson were then driven to areas near their homes and released.

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[2] Monroe was killed in a "homicidal death" while this appeal was pending.

The defendants were arrested and charged with murder, kidnapping and felonious assault. The first attempt to bring them to trial was aborted by a mistrial. Less than two weeks later they were brought to trial again.[3]

On the fourth day of the second trial, the jury was excused and, with the defendants present, the defense moved for a mistrial claiming that a newspaper article about the case published in a local paper the day before contained information that might prejudice the jury against the defendants. The defense was also worried about a television news feature dealing with another case that had appeared on two local television stations the day before. The subject of the film was witness intimidation. This troubled the defense because one of the prosecution witnesses who testified against the defendants at the preliminary examination changed her testimony at trial.[4]

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[3] Time was of the essence to the prosecution because of witness attrition. One prosecution witness was shot and killed on the way to the preliminary examination. Another testified at the examination, but disappeared before the case could be brought to trial. A third prosecution witness testified against the defendants at the examination but changed her testimony at trial. She disappeared after the trial. A fourth witness was killed after the trial.

[4] The jurors were not aware of the other instances of witness attrition discussed above in footnote 3.

The prosecutor suggested, and the judge and defense attorneys agreed, that the jurors should be questioned about the article and the film. The judge proposed that the jurors be taken to the jury room and then be summoned one by one to the judge's chambers for individual questioning. After being questioned, the jurors would be taken to the jury box in the courtroom so that they would not be able to communicate with the other jurors. This proposal was agreeable to the attorneys. The defendants did not object to this proposal or ask to be present during the questioning. They simply remained in the courtroom when the judge and all of the attorneys went to the judge's chambers.

The proceedings in the judge's chambers were stenographically recorded. The transcript, which is almost 40 pages long, shows that the judge explained the purpose of the questioning to the jurors and asked them if they had read any newspaper articles about the case. He also asked what the jurors had been watching on television and whether any newspaper articles or television films had been discussed in the jury room. The attorneys were permitted to ask additional questions if they wished. The judge told the jurors to disregard media publicity, reminded them about their oath to decide the case solely on the basis of the evidence presented in court and cautioned them not to discuss the case until deliberations began.

The questioning revealed that none of the 14 jurors knew anything about the newspaper article. Two jurors did, however, know something about the television film. One of these jurors said she did not see the film, but did hear parts of the audio transmission. She said she heard "about something down here at Recorder's Court * * *

about a witness getting their house burned". She was aware the film was not about the defendants' case. The other juror said she saw the film while dressing to come to court. She said she heard "something to the effect that was getting to jurors, or something, and witnesses, and that one witness' house had been burned." She too was aware that the film was not about the defendants' case. When asked whether shethought the things depicted in the film were happening in the defendants' case, she said "no."

These two jurors were asked whether the film would affect their judgment in any way. Both of them unequivocally said it would not. The defense attorneys indicated they were satisfied that these two jurors had not been prejudiced and could remain in the case.

When all of the jurors had been questioned, the judge and the attorneys returned to the courtroom. The judge denied the mistrial motion, and the trial resumed without comment from either of the defendants. Eventually, the two jurors who knew something about the television film participated in the verdict.

When the defendants appealed their conviction to the Court of Appeals, they objected to their absence during the questioning of the jurors. The Court of Appeals remanded the case to the trial court for an evidentiary hearing to determine whether the defendants had waived their right to be present. The Court of Appeals instructed the trial court to grant the defendants a new trial if they had not waived that right. The trial court found that there had been no waiver, and awarded the defendants a new trial. The prosecution appealed.

II

The Court of Appeals based its decision in this case on *People* v *Medcoff*, 344 Mich 108; 73 NW2d 537 (1955). The defendants in *Medcoff* had a jury trial and were convicted of violating local gambling laws. During the trial, the judge excluded the defendants, all of the attorneys and everyone else except a court reporter and the jurors from the courtroom and then questioned the jurors about possible misconduct. He failed, however, to question the jurors about the possibility that they had been prejudiced by matters outside the record, although defense counsel had earlier requested that he do so.

On appeal, this Court did not consider whether and to what extent the defendants had actually been prejudiced by their absence during the questioning. Instead, the Court said that once absence is established, "injury is conclusively presumed".[5]

Although we believe the *Medcoff* result was correct on its facts, it is no longer the law that injury is conclusively presumed from defendant's every absence during the course of a trial. No less an authority than the United States Supreme Court has recognized that even violations of constitutional rights can amount to harmless error in the circumstances of a particular case,[6] and in cases involving a defendant's absence from a part of a trial, that Court has indicated that automatic reversal is not the rule.[7] Similarly, the recent cases from the Federal Courts

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[5] *Id* 117-118.

[6] *See Chapman* v *California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967).

[7] *See Illinois* v *Allen*, 397 US 337; 90 S Ct 1057; 25 L Ed 2d 353 (1970).

of Appeal have rejected a rule of automatic reversal in cases involving a defendant's absence from trial.[8]

In our most recent case dealing with this area of criminal procedure, *People* v *Carroll*, 396 Mich 408; 240 NW2d 722 (1976), we affirmed the defendants' conviction despite their absence during the questioning of jurors similar to that in the case at bar. Implicitly, at least, the three justices who signed the majority opinion in *Carroll* and the two justices who concurred in the result rejected the principle that once absence is established "injury is conclusively presumed".

Today, we explicitly reject that principle. In its place we adopt the following language from *Wade* v *United States*, 142 US App DC 356, 360; 441 F2d 1046, 1050 (1971), as the proper test for determining whether a defendant's absence from a part of a trial requires reversal of his or her conviction:

> "It is possible that defendant's absence made no difference in the result reached. The standard by which to determine whether reversible error occurred [is] * * * whether there is 'any reasonable possibility of prejudice'."

III

In the case at bar, we believe the record shows there is no reasonable possibility that the defendants were prejudiced by their absence during the questioning of the jurors.

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[8] *See Jones* v *United States*, 299 F2d 661 (CA 10, 1962), *cert den* 371 US 864; 83 S Ct 123; 9 L Ed 2d 101 (1962); *Rice* v *United States*, 356 F2d 709 (CA 8, 1966); *Ware* v *United States*, 376 F2d 717 (CA 7, 1967); *Wade* v *United States*, 142 US App DC 356; 441 F2d 1046 (1971); *Bustamante* v *Eyman*, 456 F2d 269 (CA 9, 1972); *United States* v *Toliver*, 541 F2d 958 (CA 2, 1976).

They were not excluded from the questioning of the jurors. After the format for the questioning was discussed in their presence, they simply remained in the courtroom without objecting or asking to be present when the judge and attorneys retired to the judge's chambers.

The format for the questioning was exemplary. The jurors were questioned individually and were not permitted to communicate with the other jurors until after they all had been questioned. The judge explained the purpose of the questioning and carefully questioned each juror about the newspaper article and the television film before the next juror was questioned. All of the attorneys were present and they were permitted to ask any additional questions they wished. The judge cautioned the jurors to disregard media publicity, reminded them of their oath and told them not to discuss the case until deliberations began. All of this was stenographically recorded.

In this case, as in *People* v *Carroll and Ross*, in contrast with *People* v *Medcoff*, the questioning of the jurors did not concern posssible misconduct on their part. The factual issue here was uncomplicated and straightforward: Had the jurors seen the newspaper article or the TV program; of the two who had some knowledge of the TV program, did they think what they saw or heard concerned this case?

The record shows that none of the jurors had been prejudiced by either the article or the film. None of them knew anything about the article. The two jurors who knew something about the film did not know much about it, but they did know it was about an entirely different case. There is no indication that either of them connected the defendants with the things depicted in the film. One

of the jurors even said she did not think witnesses were being intimidated in the defendants' case.

Most importantly, both of these jurors unequivocally stated that the film would not influence their judgment in any way. The defense attorneys indicated they were satisfied that these jurors had not been prejudicedand could continue to sit as jurors in the case.

In short, we believe the defendants' absence "made no difference in the result reached". *Wade, supra*. For this reason, we reverse the Court of Appeals and reinstate the defendants' conviction.

/s/ Mary S. Coleman
/s/ John W. Fitzgerald
/s/ James L. Ryan
/s/ Charles L. Levin

OPINION

(State of Michigan - Supreme Court)

The People of the State of Michigan, Plaintiff Appellant v Thomas Frank Morgan, William Lee Cargile, Edmond B. Monroe, Defendants-Appellees. No. 55554-5.

Before the entire bench

Williams, J. (concurring in result)

I concur in the result. However, I believe *Medcoff*[1] is correct on its facts. While *Carroll*[2] reaches a different result from *Medcoff*, *Carroll* cannot be said to change the precedent of *Medcoff*, because there was no majority

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[1] *People* v *Medcoff*, 344 Mich 108; 73 NW2d 537 (1955).

[2] *People* v *Carroll*, 396 Mich 408; 240 NW2d 722 (1976).

opinion in *Carroll*[3] and it is therefore precedent only as to its facts, which are distinguishable from *Medcoff*.

In my opinion, the judge would have been in error if he had refused a request to permit the defendants to be present at the juror interrogation, because their rights might have been affected at an evidentiary proceeding and their presence could have in no way intimidated a juror as in discussing a threat to the juror by a partisan of the defendants.

However, in the instant case it would appear that the defendants were sitting with their counsel in court when the judge issued his invitation to the attorneys to join him in chambers for the interrogations. The defendants didn't move to accompany their counsel nor object before or after the meeting. Their counsel did not act to bring them into chambers nor object after the meeting.

It is the non-assertion of the right by defendants and their counsel and the fact that there was no specific denial of that right by the judge, combined with the actual non-prejudicial character of the interrogation by the judge in the presence of all counsel that inclines me to agree with the majority result. It is my opinion, however, if asserted timely, the defendants had the right to be present at the interrogation.

/s/ G. Mennen Williams
/s/ Blair Moody, Jr.

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[3] In *Carroll* one opinion had 3 signatures, and there were two concurring and one dissenting opinions each with one signature. One justice took no part in the decision. The two concurring and one dissenting opinion each relied on *Medcoff* in some degree.

DISSENTING OPINION

(State of Michigan - Supreme Court)

Before the entire bench

Kavanagh, C.J. (Dissenting)

For the first time since the unanimous vote of this Court established the rule of law in *People* v *Medcoff*, 344 Mich 108, 73 NW2d 537 (1955), it appears that there are four votes to change it.

I am still persuaded that *Medcoff* is the better rule for the reasons I listed in *People* v *Carroll*, 396 Mich 408, 240 NW2d 722 (1976).

Accordingly I would affirm the Court of Appeals and the trial court and order a new trial.

/s/ Thomas Giles Kavanagh